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Rodrigo et al v Gonzales 03-72740CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BYBEE, J., dissenting.

The BIA concluded that the “mistreatment experience[d] by the [petitioner] was not on account of a protected ground.” I cannot agree. Vuyanee Rodrigo was raped in her home by Bala Singham, a leader of the Liberation Tigers of Tamil Eelam (LTTE) militia, who told her “this is the punishment for you Sinhalese women who betrayed us” and “this is what Sinhal people like you will get.” Because Rodrigo was raped at least in part because of her ethnicity, our cases establish that this is sufficient to prove past persecution.

An asylum applicant need not prove her past persecution was perpetrated solely on account of a protected ground. Mixed motives are acceptable. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004). In *Ali v. Ashcroft*, we overturned the BIA’s finding that there was no ethnic persecution where “the attackers’ words themselves evidence[d] that they were motivated, at least in part, by [petitioner] Ali’s clan status and political opinion, and not solely by criminal opportunism.” 394 F.3d 780, 786 (9th Cir. 2005). While gang-raping petitioner Ali during a burglary, Somali militia members “contemporaneously declared that Ali was ‘getting what [she] deserve[d]’ because she was a Midgan.” *Id.* This, we found, “was to send a savage message to Ali and other members of Muuse Dirriye clan that they were no longer in political power.” *Id.* at 787.

Even where the rapist did not declare his purpose, we have overturned the BIA for ignoring mixed motives. In *Shoafera v. INS*, the petitioner said she was raped because her attacker “probably was attracted to me,” but also “ ‘[c]ause I’m an Amhara. If I was a Tigrean he wouldn’t do it.’ ” 228 F.3d 1070, 1072 (9th Cir. 2000). We concluded that “Shoafera suffered past persecution on account of ethnicity.” *Id.* at 1076.

Rodrigo’s case is similar to *Ali* and arguably stronger than *Shoafera*. Rodrigo presented direct evidence of motivation by reporting the rapist’s own explanation for the act. Unfortunately, her argument is hindered by an underdeveloped record and poor briefing. Although the Immigration Judge recited Rodrigo’s statements, he did not consider its possible significance for evaluating Singham’s motives. The BIA cited *Shoafera* but offered no explanation.

Once Rodrigo has established past persecution, the burden shifts to the government to rebut the presumption that Rodrigo has a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1). I would grant the petition and remand to the BIA to determine whether there is sufficient evidence to overcome the presumption, and whether, as the government contends, Rodrigo can be safely relocated elsewhere within Sri Lanka. *See* 8 C.F.R. § 1208.13(b)(1)(i)(B).

I respectfully dissent.